United States Department of Labor
Employees' Compensation Appeals Board

M.M., Appellant	)	
and	)	**Docket No. 06-1130**
	)	**Issued: September 14, 2006**
DEPARTMENT OF HOMELAND SECURITY, CITIZENSHIP & IMMIGRATION SERVICE, Laguna Niguel, CA, Employer	)	

Appearances:
Thomas Martin, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On April 10, 2006 appellant filed a timely appeal from a decision of the Office of Workers' Compensation Programs dated January 6, 2006, which denied her claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant met her burden of proof to establish that she sustained an emotional condition in the performance of duty causally related to factors of her federal employment.

FACTUAL HISTORY

On July 14, 2004 appellant, then a 43-year-old center adjudication officer (CAO), filed a claim alleging continuous harassment by her first and second line supervisors who asked her to perform illegal and unethical activities. She also alleged that the demanding quantity of her

workload caused stress, anxiety and depression. Appellant stopped work on July 7, 2004.[1] She submitted an August 28, 2003 emergency room report in which Dr. R.S. Jacobs, Board-certified in emergency medicine, diagnosed atypical chest pain. In a July 7, 2004 treatment note, Dr. Julie Chu, a Board-certified internist, noted that appellant became stressed at work and diagnosed depression, a self-inflicted hand contusion and headache.

By letter dated July 20, 2004, the employing establishment controverted the claim. Wendy Valdez, appellant's first-line supervisor, stated that on July 7, 2004 she called appellant to her office to discuss the work at home (WAH) policy. She noted that appellant had certain performance deficiencies and, after consultation with the WAH coordinator, it was recommended that appellant be taken off a WAH schedule. Ms. Valdez reported that appellant reacted in an unprofessional manner by using profanity and raising her voice. Appellant immediately left work as she felt sick.

On August 6, 2004 the Office informed appellant of the evidence needed to support her claim and requested that the employing establishment respond to her allegations. Appellant submitted an August 27, 2004 statement. She noted that she began working at the employing establishment on May 5, 2002 and began the WAH program in August 2003. Appellant began having problems after Ms. Valdez became her supervisor and alleged that Ms. Valdez behaved inappropriately with Steve Brickett, Jr., a coemployee, who sent out inappropriate emails. She alleged that she was asked to approve the immigration applications of criminals who would have unacceptable documentation. Appellant's regular schedule was 10-hour days, 4 days a week, with 2 days being WAH. She stated that it was a hardship for her to drive to work because the roundtrip was 224 miles per day. Ms. Valdez advised her to keep her production up or the WAH privilege would be removed. Appellant stated that in her absence Ms. Valdez would rummage through her workstation. On August 27, 2003 she was called into a meeting with Ms. Valdez and Lubirda Goodman, her second-line supervisor and Sondra Gottschalk, union president. At the meeting, Ms. Valdez stated that her work contained discrepancies and accused her of completing little work when she was on WAH status. Appellant became ill after the meeting, went to the emergency room and was later placed on Xanax by her physician.

Appellant reported that the issues were resolved in a November 5, 2003 meeting with the same attendees. She acknowledged that she had entered work done under an incorrect date because the system was down or that she would sometimes wait a day to enter her work. Appellant had served as acting supervisor when Ms. Valdez was on sick leave and that Ms. Valdez had not complimented her on doing a good job. Appellant alleged that the only interest the employing establishment had was in producing numbers, and that they were told to ignore "Tony" and "Oscar" lists of employers with bad records. Ms. Valdez frequently changed job assignments and called her into the office and threatened the suspension of appellant's WAH status. Appellant noted that her husband worked rotating shifts and it was difficult to arrange a babysitter for their eight-year-old son. Ms. Valdez rated her performance as fully successful when she had always received excellent ratings in the past. On July 7, 2004 Ms. Valdez called her into the office to discuss her performance, stating that appellant's production was low and

[1] Appellant filed a Form CA-1, traumatic injury claim. The claim was adjudicated by the Office as an occupational disease claim.

that she mismanaged her time and canceled her WAH status. She became ill, left work, and went to urgent care where she was seen by Dr. Chu but was currently under the care of Dr. Trayce Hansen, a licensed psychologist, and Dr. Mitchel Stein, Board-certified in psychiatry.

In a July 26, 2004 disability slip, Dr. Stein advised that appellant could not work. In an August 9, 2004 attending physician's report, he diagnosed major depression with psychosis and checked the "yes" box, indicating that the condition was employment related, stating that it was due to a pattern of harassment. Dr. Hansen provided a report dated August 4, 2004 advising that appellant could not work until September 13, 2004 at the earliest. By report dated October 7, 2004, Dr. Stein noted a history that appellant previously had psychiatric symptoms in the 1990s following a "whistle-blowing" incident. Appellant's symptoms reappeared when she was accused of falsifying documents by her supervisor in late 2003 and again in July 2004 when she had problems with the same supervisor. Dr. Stein diagnosed major depression, probably recurrent, with psychosis, secondary to "acute stressors" in her workplace. In a December 9, 2004 report, Dr. Hansen advised that she had been treating appellant since July 9, 2004 for symptoms of depression, fear and anxiety, apparently precipitated by accusations made by appellant's supervisor that she had falsified government documents. She diagnosed major depressive disorder, recurrent, severe, with psychotic symptoms.

Appellant's husband submitted an August 24, 2004 statement supportive of her claim. In an August 31, 2004 letter, Ms. Gottschalk noted that on August 27, 2003 she represented appellant during a formal discussion with her supervisors regarding her work performance, including that she was not properly reporting her work. It was agreed that a good deal of the problem arose from a misunderstanding regarding how and when to report the results of work performed at home. At a November 5, 2003 meeting, "resolution was reached to the mutual benefit of both management and the employee." In an August 31, 2004 statement, Ruben D. Rodriguez, CAO, stated that his work area was adjacent to appellant. He witnessed her harassment, stating that her supervisor would enter her cubicle to review her work. Mr. Rodriguez contended that unethical adjudication practices took place.

In an October 14, 2004 statement,[2] Lu Goodman, assistant center director, advised that she supervised appellant and Ms. Valdez whom she characterized as hardworking, dedicated and mild-mannered. Ms. Goodman was aware of no improper adjudications and opined that appellant was supervised in a "more than reasonable manner." Cesar Hernandez, a supervisory CAO, provided an October 14, 2004 statement. He advised that he had worked with Ms. Valdez since August 2003 and had never seen her behave in an inappropriate or unprofessional manner. When Ms. Valdez discovered that appellant was reporting the same adjudication numbers on different days to reflect fictitious daily production, she asked him if he had ever encountered the same problem. Mr. Hernandez advised Ms. Valdez to immediately remove appellant from the WAH program.

In an October 22, 2004 statement, Gerald McMahon, special assistant to the director, noted that he had discussed appellant's allegations with Ms. Goodman, Ms. Valdez, and supervisors Hernandez and Anthony Daniel. He characterized appellant's allegation that she was

[2] The October 14, 2003 date is apparently a typographical error.

instructed to perform illegal and unethical adjudications as "unequivocally false and inaccurate." He advised that immigration law and regulations were applied in all situations and was unaware of any guidance for appellant to accept fraudulent documents. Mr. McMahon further noted that a workstation was government property which a supervisor had the right to access. Appellant possessed less than efficient updating techniques with conflicting information but that, as yet, no disciplinary action had been taken. She was not required to perform work beyond her job description and her rating was fully successful. Mr. McMahon advised that appellant tended to have attitude issues with disruptions in the workplace that required verbal admonishments. Management proposed a three-day disciplinary suspension for her conduct but that she had not returned to work to receive the proposed notice. He opined that Ms. Valdez was a conscientious supervisor of 10 employees and went out of her way to support appellant, including her participation in the WAH program. On multiple occasions, appellant took work home that could not be performed during a WAH shift which disqualified her for the WAH program. He concluded that appellant had nonwork-related stress issues related to her father's health and her long commute.

By decision dated December 23, 2004, the Office denied the claim on the grounds that appellant did not establish a compensable factor of employment. On January 14, 2005 appellant, through counsel, requested a hearing that was held on October 26, 2005. At the hearing, appellant described her job as CAO, stating that she adjudicated applicants for green card immigration status. She testified that Ms. Valdez became her supervisor in February 2003 and alleged that she inappropriately "snooped." Appellant stated that the concerns expressed at the August 2003 meeting were resolved noting that, while Ms. Valdez claimed appellant had padded her report, she did not understand appellant's reporting methods and the issue was resolved at the November 2003 meeting. She became upset that Ms. Valdez questioned her integrity and when her WAH participation was cancelled. Appellant stated that she was overworked the entire time she was at the employing establishment. Because she was a senior CAO, others came to her with questions, which meant that she had to stay late to complete her work and could not produce as much. She was not paid for overtime but would work an extra hour every day she was at work but did not record this on her sign-in sheets. She alleged that too many borderline cases were approved, testifying that Ms. Valdez told her to approve applicants with serious criminal records and homemade proof of residence. Appellant alleged that inappropriate emails were sent and that management did nothing about it. She grieved the 2003 meeting and the withdrawal of the WAH program but a decision had not been issued. Appellant also had a pending Equal Employment Opportunity (EEO) Commission claim. She was terminated on December 16, 2004 for inability to perform her position.

Mr. Rodriguez also testified that, while he was not on appellant's team, he was also instructed to ignore applicants' criminal records, that the Tony and Oscar lists were not used, and that he saw Ms. Valdez go into appellant's cubicle. He opined that the production quota was too high and stated that he was terminated, ostensibly for time and attendance fraud, but actually because he supported appellant's EEO claim.

Appellant submitted documents titled "Tony Awards" and "Oscars" consisting of lists of businesses, copies of staff emails, a number of performance appraisals, including one dated April 21, 2004 in which appellant was rated by Ms. Valdez and refused to sign, time sheets, information regarding her EEO claim, and the December 16, 2004 termination. In a July 29,

2004 disability slip, Dr. Hansen opined that she could not work and on August 30, 2005, she advised appellant that she was discontinuing her practice.

By decision dated January 6, 2006, an Office hearing representative affirmed the December 23, 2004 decision.

LEGAL PRECEDENT

To establish her claim that she sustained an emotional condition in the performance of duty, appellant must submit the following: (1) medical evidence establishing that she has such a condition; (2) factual evidence identifying employment factors or incidents alleged to have caused or contributed to the condition; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to her stress-related condition.[3] If a claimant does implicate a factor of employment, the Office should then determine whether the evidence of record substantiates that factor. When the matter asserted is a compensable factor of employment and the evidence of record establishes the truth of the matter asserted, the Office must base its decision on an analysis of the medical evidence.[4]

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment. In the case of *Lillian Cutler*,[5] the Board explained that there are distinctions as to the type of employment situations giving rise to a compensable emotional condition arising under the Federal Employees' Compensation Act.[6] There are situations where an injury or illness has some connection with the employment but nevertheless does not come within coverage under the Act.[7] When an employee experiences emotional stress in carrying out his or her employment duties, and the medical evidence establishes that the disability resulted from an emotional reaction to such situation, the disability is generally regarded as due to an injury arising out of and in the course of employment. This is true when the employee's disability results from his or her emotional reaction to a special assignment or other requirement imposed by the employing establishment or by the nature of the work.[8]

As a general rule, an employee's emotional reaction to administrative or personnel actions taken by the employing establishment is not covered because such matters pertain to procedures and requirements of the employer and are not directly related to the work required of the employee.[9] An administrative or personnel matter will be considered to be an employment

[3] *Leslie C. Moore*, 52 ECAB 132 (2000).

[4] *See Dennis J. Balogh*, 52 ECAB 232 (2001).

[5] 28 ECAB 125 (1976).

[6] 5 U.S.C. §§ 8101-8193.

[7] *See Robert W. Johns*, 51 ECAB 137 (1999).

[8] *Lillian Cutler*, *supra* note 5.

[9] *Felix Flecha*, 52 ECAB 268 (2001).

factor, however, where the evidence discloses error or abuse on the part of the employing establishment.[10]

For harassment or discrimination to give rise to a compensable disability under the Act, there must be evidence introduced which establishes that the acts alleged or implicated by the employee did, in fact, occur. Mere perceptions of harassment or discrimination are not compensable under the Act. Unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred. Rather, the issue is whether the claimant under the Act has submitted sufficient evidence to establish a factual basis for the claim by supporting his or her allegations with probative and reliable evidence.[11]

ANALYSIS

Appellant described specific incidents of disagreement with her supervisor, Ms. Valdez. Generally an employee's complaints concerning the manner in which a supervisor performs his or her duties as a supervisor or exercises his or her supervisory discretion fall, as a rule, outside the scope of coverage of the Act. This principle recognizes that a supervisor or manager, must be allowed to perform their duties, that employees will at times dislike the actions taken.[12] Furthermore, mere disagreement or dislike of a supervisory or management action will not be compensable without a showing through supporting evidence that the incidents or actions complained of were in error or abusive.[13] The Board finds that Ms. Valdez's actions in holding the meeting on August 27, 2003 fell within her supervisory capacity. There is no evidence of record to establish that this meeting constituted a compensable factor of employment under the Act. Appellant acknowledged that she had not properly documented her work. Ms. Gottschalk merely noted that the issues raised in the meeting were resolved to the mutual benefit of appellant and her supervisors. Error or abuse by Ms. Valdez has not been established by accessing appellant's workstation. The monitoring of activities at work is an administrative function of the employer,[14] as is a performance appraisal.[15] While an administrative or personnel matter will be considered to be an employment factor where the evidence discloses error or abuse on the part of the employing establishment,[16] appellant submitted insufficient evidence in this case. Thus, these are not compensable factors of employment.

The Board finds that the withdrawal of appellant's WAH status is not compensable. An employee's frustration over not being permitted to work a particular shift or to hold a particular

[10] *James E. Norris*, 52 ECAB 93 (2000).

[11] *Id.*

[12] *Judy L. Kahn*, 53 ECAB 321 (2002).

[13] *Id.*

[14] *Barbara J. Latham*, 53 ECAB 316 (2002).

[15] *Felix Flecha*, *supra* note 9.

[16] *James E. Norris*, *supra* note 10.

position is not covered under the Act.[17] The assignment of a work schedule or tour of duty is recognized as an administrative function of the employing establishment and, absent any error or abuse, does not constitute a compensable employment factor.[18] Appellant's allegations that her commute was too far and that she had difficulty obtaining a babysitter constitute self-generated frustration at not being allowed to work the job location or hours she preferred. Mere disagreement or dislike of a supervisory or management action will not be compensable without a showing through supporting evidence that the incidents or actions complained of were unreasonable.[19] In this case, the Board finds that it was reasonable for the employing establishment to withdraw the WAH schedule. Ms. Valdez explained that appellant had certain performance deficiencies and, after consultation with the WAH coordinator, it was recommended that appellant be taken off WAH status. Appellant did not establish that the employing establishment erred in regard to this administrative matter and any reaction must be considered self-generated.[20]

Appellant alleged that it was improper for Mr. Brickett to circulate emails. The Board has recognized the compensability of verbal abuse in certain circumstances. This, however, does not imply that every statement uttered in the workplace will give rise to compensability.[21] In this instance the Board finds that, while the emails may not have been in good taste, the fact that Mr. Brickett circulated them would not constitute a compensable factor as appellant did not show how this would rise to the level of verbal abuse or otherwise fall within the coverage of the Act.[22]

Appellant generally contended that she was harassed by management and that she filed an EEO claim. With regard to emotional claims arising under the Act, the term "harassment" as applied by the Board is not the equivalent of "harassment" as defined or implemented by other agencies, such as the EEO Commission, which is charged with statutory authority to investigate and evaluate such matters in the workplace. Rather, in evaluating claims for workers' compensation under the Act, the term "harassment" is synonymous, as generally defined, with a persistent disturbance, torment or persecution, *i.e.*, mistreatment by coemployees or workers. Mere perceptions of harassment or discrimination are not compensable under the Act,[23] and unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred. A claimant must establish a factual basis for his or her allegations with probative and reliable evidence.[24]

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[17] *Kim Nguyen*, 53 ECAB 127 (2001).

[18] *Penelope C. Owens*, 54 ECAB 684 (2003).

[19] *Katherine A. Berg*, 54 ECAB 262 2002).

[20] *See Dennis J. Balogh*, *supra* note 4.

[21] *Denise Y. McCollum*, 53 ECAB 647 (2002).

[22] *See Peter D. Butt, Jr.*, 56 ECAB __ (Docket No. 04-1255, issued October 13, 2004).

[23] *Beverly R. Jones*, 55 ECAB __ (Docket No. 03-1210, issued March 26, 2004).

[24] *James E. Norris*, *supra* note 10.

While appellant submitted statements from her husband and Mr. Rodriguez, these do not establish her allegations as factual. Her husband did not witness the specific incidents alleged to constitute harassment or discrimination. The Board finds Mr. Rodriguez' testimony vague and general, not sufficient to establish harassment. Ms. Goodman and Mr. McMahon both advised that CAOs were not instructed to perform illegal or unethical adjudications. A claimant must establish a factual basis for his or her allegations with probative and reliable evidence.[25] In the case at hand, the Board finds that appellant's allegations do not rise to a level to establish harassment, rather they constitute her perception. As appellant did not establish as factual a basis for her perceptions of discrimination or harassment by the employing establishment, she did not establish that harassment and/or discrimination occurred.[26] The evidence instead suggests that the employee's feelings were self-generated and thus not compensable under the Act.[27]

Finally, appellant made a general allegation that overwork caused her stress and testified that she had to stay late to complete her work because other employees would come to her with questions. She, however, admitted that she did not claim overtime and that this extra work was not reflected on her sign-in sheets. Moreover, her performance was rated as fully successful. The Board therefore finds that she did not provide sufficient evidence to document the alleged overwork and, consequently, this allegation was not established by the evidence.[28]

CONCLUSION

The Board finds that appellant failed to meet her burden of proof to establish that she sustained an emotional condition in the performance of duty causally related to her federal employment.

[25] *Id.*

[26] *Id.*

[27] *See Gregorio E. Conde*, 52 ECAB 410 (2001).

[28] *Bonnie Goodman*, 50 ECAB 139 (1998).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 6, 2006 be affirmed.

Issued: September 14, 2006
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board